Supreme Court, U. S.
FILED
DEC 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-908

STEPHEN R. DEANGELO, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARVIN D. MILLER
Attorney for Petitioner
117 North Fairfax Street
Alexandria, Virgiina 22314
(703) 836-5108

December, 1978

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS 5

II. THIS DECISION IS IN CONFLICT WITH THIS COURT'S PRIOR DECISION IN *Bumper* v. *North Carolina* 6

III. THE DECISION IN THIS CASE IS IN CONFLICT WITH THIS COURT'S PRIOR DECISION IN *Terry* v. *Ohio* 9

CONCLUSION 12

APPENDIX:

A. *United States* v. *DeAngelo*, No. 76-239-A (E.D. Va. November 17, 1976) 1a

B. *United States* v. *DeAngelo*, No. 77-1132 (4th Cir. October 4, 1978) 2a

C. *United States* v. *DeAngelo*, No. 77-1132 (4th Cir. October 30, 1978) 5a

D. 49 U.S.C. § 1511 ..... 6a

E. 49 U.S.C. § 1356(a) 7a

F. 14 C.F.R. § 121.538 ..... 8a

G. Eastern Airlines Standard Security Program 52-145, p. 11 and 12 ..... 12a

Page

CASES:

Adams v. *Williams*, 407 U.S. 143 (1972) 9, 10, 11
Bumper v. *North Carolina*, 391 U.S. 543 (1968) 6, 7, 9
Coolidge v. *New Hampshire*, 403 U.S. 443 (1971) 7
Katz v. *United States*, 389 U.S. 347 (1963) 7
Schneckloth v. *Bustamente*, 412 U.S. 218 (1973) 7
Sibron v. *New York*, 392 U.S. 40 (1968) 7, 9, 11
Terry v. *Ohio*, 392 U.S. 1 (1968) 4, 5, 9, 10, 11, 12
United States v. *Dalpiaz*, 494 F. 2d 374 (6th Cir. 1974) 10
United States v. *Davis*, 482 F. 2d 893 (9th Cir. 1973) .. 6
United States v. *Edwards*, 498 F. 2d 496 (2d Cir. 1974) 8
United States v. *Epperson*, 454 F. 2d 769 (4th Cir. 1972) 4, 10
United States v. *Homburg*, 546 F. 2d 1350, 1351-52 (9th Cir. 1977) 4, 5
United States v. *Kroll*, 481 F. 2d 884, 886 (8th Cir. 1973) 6
United States v. *Lindsey*, 451 F. 2d 701 (3rd Cir. 1971) 10
United States v. *Miner*, 484 F. 2d 1075 (9th Cir. 1973) 6
United States v. *Moore*, 483 F. 2d 1361 (9th Cir. 1973) 6
United States v. *Moreno*, 475 F. 2d 44 (5th Cir. 1973) 10

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fourth Amendment 2, 6, 11

STATUTES:

14 C.F.R. § 121.538 .....2, 4, 11
28 U.S.C. § 1254(1) 2
49 U.S.C. § 1356(a) 2, 11
49 U.S.C. § 1511 .....2, 4, 11

OTHER:

Eastern Airlines Standard Security Program 52-145 .....2, 4, 8, 11
Webster's New International Dictionary Second Edition Unabridged (1946) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. -

STEPHEN R. DEANGELO, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, STEPHEN R. DEANGELO, requests that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit has been officially reported in 24 Criminal Law Reporter 2154 and is annexed to the Petition as Appendix B (p. 2a). The other relevant decisions in this case have not been officially reported. The initial decision of the District Court is annexed to the Petition as Appendix A (p. 1a). The Order of the Court of Appeals denying a rehearing is Appendix C (p. 5a).

JURISDICTION

The Court rendered its decision on 4 October 1978. An Order denying a rehearing was entered on 30 October, 1978. This Petition is timely filed, an Order extending the time for filing this Petition for Certiorari to 6 December, 1978 having been entered. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment is violated when a prospective airline passenger's brief case is physically searched despite his clearly expressed intention of not boarding the aircraft and his objection to the search based on his reliance on the Fourth Amendment and an official sign which indicated his right to refuse such a search, if requested.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions relevant to this Petition are Amendment IV of the Constitution, 49 U.S.C. § 1356; 49 U.S.C. § 1511; 14 C.F.R. § 121.538; and Eastern Airlines Standard Security Program 52-145, p. 11 and 12. They are set forth in full as Appendix items D-G of this Petition.

STATEMENT OF THE CASE

On 4 October, 1976 Petitioner obtained a boarding pass for the Eastern Airlines Shuttle Flight from Washington, D.C. to New York City. At the screening point, he passed through the magnometer without incident, but for reasons never explained the x-ray picture of his brief case appeared black. (TR. 12 November p. 21).* The security officer asked Petitioner if she could physically inspect his brief case and he declined. (TR. 12 November, p. 30). A Federal Aviation Administration Officer joined the discussion and informed Petitioner that he would have to take another means of transportation if he did not allow the physical search. (TR. 12 November p. 31). Relying on that statement and an officially posted sign, Petitioner elected to refuse the requested search and not take the flight. (TR. 12 November, p. 31).[2] When told of Petitioner's decision the F.A.A. officer, nonetheless, opened the brief case and physically searched it without permitting Petitioner to leave the airport. (TR. 17 November, p. 25 and 26). This search uncovered a small baggie of marijuana and in a subsequent search of Petitioner, a pinch, .002 grams, of cocaine and a small piece, 13.7 grams, of hashish were found. The only reasons given for the search by the officer was that Petitioner was in a secure area and that the contents of the brief case were unknown. (TR. 17 November p. 26). There was no evidence offered that Petitioner fit any profile or that anyone at the scene thought him to be armed or dangerous.

Petitioner was charged with the misdemeanor of possessing controlled substances. Prior to his trial, he filed and argued a motion to suppress the seized evidence. Petitioner argued that he had the right to refuse

[1] The sign read as follows: "X-Ray Baggage Inspection. Carry On Baggage Is Being Inspected By X-Ray. Inspection Will Not Affect Ordinary Developed Film. Physical Inspection May Be Requested."

[2] The sign read "X-Ray Baggage Inspection. Carry On Baggage Is Being Inspected By X-Ray. Inspection Will Not Affect Ordinary Film. Physical Inspection May Be Requested."

* This designation is that used in the Appendix to the Brief filed in the Fourth Circuit.

physical inspection of his brief case and forego the flight as the posted sign indicated and as law and the Eastern Airline Security Program provided.[3] There were no articulated facts offered for a *Terry* pat-down or frisk. The search of this brief case went far beyond a pat down or frisk of the outer clothing. The suppression motion was denied. Trial by the Court, without a jury, was held on 17 November, 1976. The motion to suppress was renewed and denied. Petitioner was found guilty of unlawful possession of controlled substances.

Petitioner noted his appeal and the case was argued before the Fourth Circuit Court of Appeals on 12 September, 1978 and denied on 4 October, 1978. The Court of Appeals held that Petitioner had consented to the search by electing to fly and could not withdraw his consent and that the posted sign clearly gave him notice that a request to physically search, if made, could not be refused.[4] The Court also held that the decision in *Terry* v. *Ohio,* 392 U.S. 1 (1968) and *United States* v. *Epperson,* 454 F. 2d 769 (4th Cir. 1972) permitted this search of the brief case under the circumstances.[5] This case expands those rulings beyond

[3] The airline regulations provide, as do the Federal Regulations and the United States Code, that one who refuses a requested search may not board an aircraft, and that signs informing the public of the right to refuse be posted. Eastern's Security Program 52-145, p. 11, 12; 49 U.S.C. 1511; 14 C.F.R. 121-538.

[4] The Court did recognize that the decision from the 9th Circuit in *United States* v. *Homburg,* 546 F. 2d 1350, 1351-52 (9th Cir. 1977) was in opposition to its point of view.

[5] The Court in its opinion stated that because the x-ray did not reveal the contents of the brief case, Petitioner knew in advance that this was going to happen notwithstanding the fact that no explanation for the machinery failure was ever offered. The Court held that he tried to carry articles unto the plane concealed from x-ray, although when told that the x-ray did not disclose the case's contents and a physical search was requested, he said he would forego the flight.

any previous decisions and is in conflict with other circuits.

REASONS FOR GRANTING THE WRIT

Preboarding airport searches are now employed in airports across the country. These searches result in criminal prosecutions from time to time and have resulted in rulings by many of the circuit courts as to their validity. There seems to be two basic approaches to this question, i.e., consent or a *Terry* rational. This case contains both, and is not only in conflict with other circuits on the consent issue, but has also expanded the *Terry* "stop and frisk" rational further than any previous decision of this Court. This Court has not ruled on airport searches, and it is time that the questions surrounding this issue be addressed. When can one withdraw consent? What notice is required to create consent? What is the permissable scope of these searches? These questions need answers from this Court.

I. The Decision Below Is in Conflict With Decisions in Other Circuits.

The Fourth Circuit in its decision below held that once a prospective passenger voluntarily enters the screening process he may not withdraw. This ruling, as the Court recognized, is in conflict with the decision of the Ninth Circuit. In *United States* v. *Homburg,* 546 F. 2d 1350, 1352 (9th Cir. 1977), the Ninth Circuit said ". . . a party may revoke his consent to be searched any

time prior to boarding the plane, even when he has passed beyond the initial screening point, if he agrees to leave the boarding area. Other decisions of this Court have also recognized that a pessanger always maintains the option of leaving. See e.g., *United States* v. *Miner,* 484 F. 2d 1075 (9th Cir. 1973); *United States* v. *Moore,* 483 F. 2d 1361 (9th Cir. 1973)." See additionally, *United States* v. *Davis,* 482 F. 2d 893 (9th Cir. 1973). The Eighth Circuit went even further in *United States* v. *Kroll,* 481 F. 2d 884, 886 (8th Cir. 1973) when it held that "Compelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; . . ."

Had Petitioner been in an airport in Washington State rather than in Washington, D.C., this case would not now be before this Court. This conflict needs resolution so that people flying from one state to another will be accorded the same treatment in each airport. One ought to be allowed to withdraw his consent so long as he leaves the boarding area, for once he elects not to board, the purpose of preventing weapons and the like from being carried onto the plane by a passenger has been accomplished.

II. This Decision Is in Conflict With This Court's Prior Decision in *Bumper* v. *North Carolina.*

The decision in this case permits law enforcement personnel to trick people into giving their consent and prohibits someone from withdrawing consent once given.

This Court has often ruled that warrantless searches are per se unreasonable with certain carefully drawn

exceptions. *Katz* v. *United States,* 389 U.S. 347 (1963); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *Sibron* v. *New York,* 392 U.S. 40 (1968). Consent has been one of the exceptions and while one need not necessarily have his right to withhold consent read like a *Miranda* warning, he may not be coerced or tricked into giving it, and if not given, consent cannot be the basis of a search. *Bumper* v. *North Carolina,* 391 U.S. 543 (1968) and *Schneckloth* v. *Bustamente,* 412 U.S. 218 (1973).

The record in this case clearly shows that Petitioner placed his brief case for x-ray inspection; that he walked through the magnometer; that when asked if he would consent to physical inspection of his brief case because of the failure of the x-ray to show its contents, he refused; that he was told that he could not fly if he refused; that he withheld his consent to search and agreed not to fly; that he did not leave the screening point and enter the boarding lounge, nor was he permitted to leave the airport; and that the officially posted sign stated unequivocally that physical inspection "may be requested"—not that it could be demanded. (Tr. 12 November, P. 21, 22, 30, 31, 34).

Petitioner did not consent to a physical inspection of his brief case. His consent to the magnometer and the x-ray did not extend to physical intrusions. There is no statute or decision from this Court to the effect that one may not give limited consent, e.g., you can search the interior of my car, but not my trunk, or that consent once given may not be withdrawn, e.g., I consented to your search of the ground floor of my house, but I have now decided not to agree to any search of the upstairs—please leave.

When the officers asked for Petitioner's consent to search his brief case, they acted properly. The posted sign did not say that prospective passengers were "subject to search" as in *United States* v. *Edwards,* 498 F. 2d 496 (2d Cir. 1974); rather, it said that "physical inspection may be requested". One ought to be permitted to rely on the common meaning and usage of his Country's official language. The words "may be requested" simply do not mean that a request, if made, most be honored, i.e., they do not mean, can be demanded. Webster's New International Dictionary Second Edition Unabridged (1946) defines request as "1. Act or an instance of asking for something or some action desired; expression of desire; entreaty; petition". No dictionary defines "request" as demand. The intention of the author of the sign in this case may have been to indicate that prospective passengers were subject to physical searches and that physical searches could be demanded or even required, but that is not what was printed. The decision in this case would permit prospective passengers to be tricked for they could not trust the ordinary meaning of words on official signs. It is not the intent or purpose which controls, it is the words used. It should also be noted that the Eastern Airlines Security Program required that "At *all locations* . . . both within and outside the U.S.—conspicuously post a sign with signs advising individuals that:

(a) those passing the screening point must be screened, and

(b) an individual may refuse to be searched but, if he does so, he will not be permitted to pass the screening point." There was no such sign posted; the only

sign was the one indicating that "physical inspection may be requested."

When the officers searched the brief case over Petitioner's objection, they were not conducting a consent search.

This decision is contrary to *Bumper, supra* not only because there was no actual consent but also because the decision results in permitting one to be tricked into giving consent when one clearly does not intend to. Such a ruling is inherently unfair.

III. The Decision in This Case Is in Conflict With This Court's Prior Decision in *Terry* v. *Ohio.*

This Court's ruling in *Terry* v. *Ohio,* 392 U.S. 1 (1968) was intended to strike a balance "to permit a reasonable search for weapons for the protection of the police officer where he has reason to believe that he is dealing with an armed and dangerous individual . . ." *Id.* p27. The criteria set forth was that of the reasonably prudent man. In *Sibron* v. *New York,* 392 U.S. 40 (1968), a companion case, the Court clarified this criteria by requiring that "he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous". *Id.* p64. Once it was established that there was a reasonable likelihood that the individual was armed and dangerous, with articulable facts, a search confined "to what was minimally necessary to learn" whether or not the individual was armed was permitted. *Terry, supra* at 30. This concept of the limited intrusion was reiterated recently in *Adams* v. *Williams,* 407 U.S. 143 (1972). In that case, an officer acting on a reliable tip approached a suspicious car in a high crime area late at night and reached in the car window removing a gun

from the driver's waistband where the tipster said it would be located.

The pat down frisk in *Terry* and the officer's actions in *Adams* were based upon articulated reasonable suspicion that the individuals were armed and were carefully confined to minimal intrusions of the persons' outer clothing. Similarly, in airport searches based on the *Terry* rational one usually finds articulable facts such as prominent bulges in clothing and unusual behavior, such as unusual nervousness and activated magnometers. Cf. *United States* v. *Moreno,* 475 F. 2d 44 (5th Cir. 1973); *United States* v. *Lindsey,* 451 F. 2d 701 (3rd Cir. 1971); and *United States* v. *Dalpiaz,* 494 F. 2d 374 (6th Cir. 1974). In this case, however, there were no bulges, as in *Moreno* and *Lindsey, supra;* there was no activation of the magnometer as in *Dalpiaz, supra* and as in *United States* v. *Epperson,* 454 F. 2d 769 (4th Cir. 1972), and there was no unusual behavior.[6]

The sole reason for this search as stated by the officers was the black x-ray screen and the fact that Petitioner was at the screening point. (TR, 17 November, p. 26). No magnometer was set off, no profile was matched and no one suspected that he was armed or

[6] In *Moreno, supra,* the defendant seemed unusually apprehensive, had a prominent bulge in his coat, when confronted was evasive, hesitant and lied; in *Lindsay, supra,* the defendant had two large bulges in his pockets, had a ticket in one name and gave the ticket agent another name, rushed into the boarding area only four minutes before departure, was nervous, looking around and perspiring and produced identification with conflicting names; in *Dalpiaz, supra* the defendant showed the security officer a gun holster, large bladed knife and a gun and even after removing all of the metal from his pockets he still activated the magnometer. In *Epperson, supra,* the defendant set off the magnometer after removing all of the metal from his pockets. He gave an unusually high reading. A pat down of his jacket revealed a gun.

dangerous. The Court's rational appears to rest upon the fact that the requested search was refused and the brief case could not be adequately inspected by x-ray. There was, however, no explanation as to the x-ray failure. Was it the machine or the brief case? No one has ever said. As for the refusal, the posted sign indicated that he could refuse, if requested.

To permit this decision to stand would improperly expand *Terry* to permit searches based upon an individual's refusal to agree to a search and a lack of knowledge of the contents of the article to be searched; further, it would expand the scope of *Terry* beyond the minimal pat-down and frisk to searches of brief cases, suit cases and the like. To permit such expansive intrusions into one's privacy on such flimsy grounds would be inconsistent with the concepts embodied in the Fourth Amendment to the Constitution.

If searches in airports are to be justified on the decisions in *Terry, supra; Sibron, supra;* and *Adams, supra,* then they must meet their high standards. Airports like automobiles are not talisman in whose presence the Fourth Amendment vanishes.

The airport screening search ought not to be allowed to degenerate to general searches for the discovery of crime. The regulations which currently exist are designed solely to prevent the carriage by passengers of weapons and the like on airline flights.[7] Refusal to sub-

[7] 49 U.S.C. 1356(a) empowers the Administration to promulgate regulations such as 14 C.F.R. 121-538 for the screening of prospective passengers. 49 U.S.C. 1511 prohibits the transporting of persons who do not agree to be searched. The remedy is not to search in spite of a refusal but to deny transport. This was the remedy set forth in Eastern Airlines' Security Program 52-145, p. 11. It was not followed, however.

mit to a physical search when the x-ray picture of one's carry on items is black is not and ought not to be sufficient grounds under *Terry* for a detailed physical search. Had there been a fear of weapons or a bomb it is doubtful that this search would have occurred right at the screening point.

CONCLUSION

Air travel has become an inherent aspect of American life, and the airport pre-boarding searching of passengers is a part of air travel. Passengers ought to be able to expect uniformity and fairness from one airport to another.

For the reasons set forth herein, it is requested that this Petition be granted.

Respectfully submitted,

MARVIN D. MILLER
Attorney for Petitioner
117 North Fairfax Street
Alexandria, Virgiina 22314
(703) 836-5108

December, 1978

APPENDIX

APPENDIX A

THE COURT: In the case of the United States against DeAngelo, the motion to suppress will be denied. I think the test here is whether the search was reasonable. I don't think you have to go to the Terry case and make that sort of a justification for the search.

The search here was reasonable under the circumstances and those circumstances were these.

The first, the notice posted, at least four of which were posted, that a physical inspection may be requested; the fact that the defendant had in the face of such a notice gone through the magnetometer; and that his reaction to the request for a search, as Judge Friendly said in one of the cases, "This defendant just miscalculated the odds."

Having gone through the magnetometer and having had the magnetometer reveal information which gave cause to search for the purpose for which the magnetometer was there, mainly to deter and prevent hijacking, he cannot, once it looks like the odds are against him, decide he wants to go back out.

There is no evidence that the search here was for any reason other than a good faith effort to comply with the purpose for which the magnetometer and searches have been set up, mainly deterrents have been set up as a means of preventing skyjacking.

For these reasons, the motion to suppress is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1132

UNITED STATES OF AMERICA, *Appellee,*

v.

STEPHEN R. DEANGELO, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued September 12, 1978 Decided October 4, 1978

Before HAYNSWORTH, Chief Judge, and BUTZNER and PHILLIPS, Circuit Judges.

Marvin D. Miller for appellant; Robert F. McDermott, Jr., Assistant United States Attorney (William B. Cummings, United States Attorney and Guy B. Maseritz, Special United States Attorney on brief) for appellee.

BUTZNER, Circuit Judge:

Stephen DeAngelo appeals his conviction for the unlawful possession of drugs, assigning as error the district court's admission of evidence seized in an airport search. Because we believe that the search was reasonable, we find no infringement of the fourth amendment.

The airport terminal displayed signs which stated: "X-RAY BAGGAGE INSPECTION. CARRY ON BAGGAGE IS BEING INSPECTED BY X-RAY. INSPECTION MAY BE REQUESTED." DeAngelo submitted his brief case to x-ray examination. When a large portion of the case appeared black on the x-ray screen, the security officer told him that a physical inspection would be necessary. DeAngelo protested, saying that he preferred not to take his flight rather than permit the inspection. Security officers opened the brief case nevertheless and saw some marijuana and some hashish. DeAngelo was then arrested, and a search of the brief case and DeAngelo incident to the arrest revealed other drugs.

DeAngelo contends that he had a right to avoid the physical inspection by electing not to board the flight. He emphasizes that the sign did not say that his brief case would be subject to search, but only that physical inspection "may be requested."

In United States v. Epperson, 454 F.2d 769 (4th Cir. 1972), we upheld the validity of an aircraft boarding search under the rationale of the stop and frisk exception to the warrant requirement that was established by Terry v. Ohio, 392 U.S. 1 (1968). Here, as in *Terry* and *Epperson,* we believe that the circumstances were sufficiently suspicious to cause a reasonably prudent man to conclude that DeAngelo might endanger the security officers and the other passengers in the airport. The officers knew that DeAngelo had attempted to board the aircraft carrying a brief case that could not be inspected adequately by x-ray, and they were justified in opening it to determine whether he was carrying a gun or explosive device which could pose an immediate danger to persons in the vicinity if the brief case were returned to him. Applying the principles expressed in *Epperson,* we conclude that the officers acted reasonably and that the search was not forbidded by the fourth amendment. *Accord,* United States v. Homburg, 546 F.2d 1350, 1352-54 (9th Cir. 1977); United States v. Dalpiaz, 494 F.2d 374, 376-79 (6th Cir. 1974).

We also conclude that the search was reasonable because DeAngelo consented to it. The FAA security regulations state that the screening system is designed to deter as well as prevent passengers from carrying weapons or explosives. 14 C.F.R. 121.538(b). DeAngelo had a choice of traveling by air or by some other means. The signs in the terminal gave him fair notice that if in the course of the total screening process a physical inspection of his hand luggage should be considered necessary to assure the safety of the traveling public, he could be required to submit it for that purpose. When he then voluntarily entered upon the screening process DeAngelo acquiesced in its full potential scope as represented to him, including physical inspection if, as developed, that should be requested. Allowing him to withdraw his luggage when the x-ray raised the suspicions of the security officers would frustrate the regulation's purpose of deterring hijacking. We therefore conclude that having consented to the search, DeAngelo could not withhold permission after the first step of the process disclosed that he was attempting to carry aboard the aircraft articles that were concealed from x-ray. *See* United States v. Edwards, 498 F.2d 496 (2d Cir. 1974); United States v. Skipwith, 482 F.2d 1272, 1277, 1280 (5th Cir. 1973). *Contra,* United States v. Homburg, 546 F.2d 1350, 1351-52 (9th Cir. 1977).

The judgment of the district court is affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1132

UNITED STATES OF AMERICA, *Appellee,*

v.

STEPHEN R. DEANGELO, *Appellant.*

Order

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Haynsworth, Judge Butzner, and Judge Phillips.

FOR THE COURT,

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

APPENDIX D

§ 1511. Authority to refuse transportation; grounds; agreements for carriage of persons or property deemed to include agreements to refuse carriage upon refusal of consent to search

(2) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier to refuse to transport—

(1) any person who does not consent to a search of his person, as prescribed in section 1356(a) of this title, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or

(2) any property of any person who does not consent to a search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance.

Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

(b) Any agreement for the carriage of persons or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier for compensation or hire shall be deemed to include an agreement that such carriage shall be refused when consent to search such persons or inspect such property for the purposes enumerated in subsection (a) of this section is not given.

Pub.L. 85-726, Title XI, § 1111, as added Pub.L. 87-197, § 4, Sept. 5, 1961, 75 Stat. 467, and amended Pub.L. 93-366, Title II, § 204, Aug. 5, 1974, 88 Stat. 418.

APPENDIX E

§ 1356. Screening procedures for passengers; promulgation and amendment of regulations by Administrator; reports to Congress; exempted air transportation operations

(a) The Administrator shall prescribe or continue in effect reasonable regulations requiring that all passengers and all property intented to be carried in the aircraft cabin in air transportation or intrastate air transportation be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier, intrastate air carrier, or foreign air carrier prior to boarding the aircraft for such transportation. One year after August 5, 1974, or after the effective date of such regulations, whichever is later, the Administrator may alter or amend such regulations, requiring a continuation of such screening only to the extent deemed necessary to assure security against acts of criminal violence and aircraft piracy in air transportation and intrastate air transportation. The Administrator shall submit semiannual reports to the Congress concerning the effectiveness of screening procedures under this subsection and shall advise the Congress of any regulations or amendments thereto to be prescribed pursuant to this subsection at least 30 days in advance of their effective date, unless he determines that an emergency exists which requires that such regulations or amendments take effect in less than 30 days and notifies the Congress of his determination.

(b) The Administrator may exempt from the provisions of this section, in whole or in part, air transportation operations, other than those scheduled passenger operations performed by air carriers engaging in interstate, overseas, or foreign air transportation under a certificate of public convenience and necessity issued by the Civil Aeronautics Board under section 1371 of this title or under a foreign air carrier permit issued by the Board under section 1372 of this title.

Pub. L. 85-726, Title III, § 315, as added Pub.L. 93-366, Title II, § 202, Aug. 5, 1974, 88 Stat. 415.

APPENDIX F

§ 121.538 Aircraft security.

(a) For purposes of this section, "certificate holder" means an air carrier as defined in § 121.1(a) (1) or (2) and a commercial operator engaging in common carriage covered by § 121.7.

(b) Each certificate holder shall adopt and put into use a screening system, acceptable to the Administrator, that is designed to prevent or deter the carriage aboard its aircraft of any explosive or incendiary device or weapon in carry-on baggage or on or about the persons of passengers, except as provided in § 121.585, and the carriage of any explosive or incendiary device in checked baggage. Each certificate holder shall adopt and put into use its security program prescribed in paragraph (c) of this section.

(c) Each certificate holder shall prepare in writing and submit for approval by the Administrator its security program including the screening system prescribed by paragraph (b) of this section, and showing the procedures, facilities, or a combination thereof, that it uses or intends to use to support that program and that are designed to—

(1) Prevent or deter unauthorized access to its aircraft;

(2) Assure that baggage is checked in by a responsible agent or representative of the certificate holder;

(3) Prevent cargo and checked baggage from being loaded aboard its aircraft unless handled in accordance with the certificate holder's security procedures; and

(4) Assure that only persons authorized under § 121.585(a) are permitted to have on or about their persons or property a deadly or dangerous weapon accessible to them while aboard any of its aircraft.

(d) Each certificate holder shall submits its security to the Administrator. Each certificate holder that is operating before March 9, 1872, shall submit its program no later

than May 8, 1972. Each certificate holder that obtains the issue of its certificate under this part after March 8, 1972, shall submit its program at least 60 days before the date of intended operations.

(e) Within 60 days after receipt of the program, the Administrator approves the program or notifies the certificate holder to modify the program to comply with the applicable requirements of this section. The certificate holder may petition the Administrator to reconsider the notice to modify. The petition must be filed with the Administrator within 30 days after the certificate holder receives the notice. Except in the case of an emergency requiring immediate action in the interest of safety, the filing of the petition stays the notice pending a decision by the Administrator.

(f) Each certificate holder shall maintain at least one complete copy of its approved security program at its principal business office, and shall make it available for inspection upon request of the Administrator.

(g) The Administrator may amend any screening system or any security program approved under this section upon his own initiative if he determines that safety in air transportation and the public interest require the amendment, or upon application by the certificate holder if the Administrator determines that the same considerations allow the amendment.

(1) In the case of an amendment upon his own initiative, the Administrator notifies the certificate holder, in writing, of the proposed amendment, fixing a reasonable period (but not less than 7 days) within which it may submit written information, views, and arguments on the amendment. After considering all relevant material, the Administrator notifies the certificate holder of any amendment adopter, or rescinds the notice. The amendment becomes effective not less than 30 days after the certificate holder receives the notice, unless it petitions the Administrator to reconsider the amendment in which case its effective date

is stayed by the Administrator. If the Administrator finds that there is an emergency requiring immediate action with respect to safety in air transportation or in air commerce, in the case of a commercial operator that makes the procedure in this paragraph impracticable or contrary to the public interest, he may issue an amendment, effective without stay, on the date the certificate holder receives notice of it. In such a case, the Administrator incorporates the findings, and a brief statement of the reasons for it, in the notice of the amended screening system or security program to be adopted.

(2) An applicant must file its application for an amendment of a screening system or security program with the Administrator at least 15 days before the date it proposes for the amendment to become effective, unless a shorter period is allowed by the Administrator. Within 30 days after receiving from the Administrator a notice of refusal to approve the application for amendment, the applicant may petition the Administrator to reconsider the refusal to amend.

(h) Each certificate holder shall at all times maintain and carry out the screening system prescribed by paragraph (b) of this section and the security program approved under paragraph (c) of this section.

(i) When a certificate holder receives a bomb or air piracy threat considered to be against a particular aircraft or flight, the certificate holder shall take the following actions to determine whether any explosive or incendiary devices, or weapons are aboard the aircraft involved.

(1) Conduct a security inspection on the ground before the next flight of the aircraft or, if the aircraft is then in flight, immediately after its next landing.

(2) If the aircraft is being operated on the ground, advise the pilot in command to immediately submit the aircraft for a security inspection.

(3) If the aircraft is in flight, advise the pilot in command to take the emergency action he considers necessary under the circumstances, in accordance with § 121.557 or § 121.559, whichever is applicable.

(j) Upon receipt of information that an act or suspected act of aircraft piracy has been committed, a certificate holder shall immediately notify the Administrator.

(k) Each certificate holder shall refuse to transport—

(1) Any person who does not consent to a search of his person in accordance with the screening system prescribed by paragraph (b) of this section; and

(2) Any property of any person who does not consent to a search or inspection of that property in accordance with the screening system prescribed by paragraph (b) of this section.

APPENDIX G

Posting Screening Point Signage

General Signage

1. At *all locations*—both within and outside the U. S.—conspicuously post a sign or signs advising individuals that:

   (a) those passing the screening point must be screened, and

   (b) an individual may refuse to be screened, but, if he does so, he will not be permitted to pass the screening point

2. *Within the United States,* ensure that the sign(s) posted contain the following information:

   —It is a crime to carry a concealed weapon aboard an aircraft

   —Federal safety rules require inspection of persons and hand-carried articles passing an inspection point.

   —Inspection may be refused

   —Persons refusing inspections will not be permitted to pass the inspection point

3. *Outside the United States,* to the extent consistent with local laws, include the same information in the sign(s) posted as that indicated above—both in English and the local language.

Signage Where Baggage is Inspected by X-Ray

1. At *any location* where an x-ray baggage inspection system is used—whether within or outside the U. S.—conspicuously post a sign or signs advising individuals that their carry-on items will be inspected by x-ray.

2. If the inspection system would expose a carry-on item to one milliroentgen or less of x-ray, post sign(s)—*within the United States*—which contain the following information:

   —Inspection will not affect ordinary undeveloped film

   —Remove all x-ray and scientific film from your baggage

   —Passengers may request physical inspection of photographic equipment and film packages

3. If the inspection system would expose a carry-on item to more than one milliroentgen of x-ray, post a sign—*within the United States*—which advises passengers to:

   —Remove film of all kinds from your baggage

Supreme Court, U. S.
FILED
FEB 14 1979
MICHAEL RODAK, JR., CLERK

No. 78-908

In the Supreme Court of the United States

OCTOBER TERM, 1978

STEPHEN R. DEANGELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

SIDNEY M. GLAZER
Attorney
Department of Justice
Washington, D.C. 20530

INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statement 2

Argument 4

Conclusion 11

CITATIONS

Cases:

Adams v. *Williams*, 407 U.S. 143 5

Bumper v. *North Carolina*, 391 U.S. 543 10

Camara v. *Municipal Court*, 387 U.S. 523 6

Elkins v. *United States*, 364 U.S. 206 4

Pennsylvania v. *Mimms*, 434 U.S. 106 ..... 4, 5

Schneckloth v. *Bustamonte*, 412 U.S. 218 8

Terry v. *Ohio*, 392 U.S. 1 ..... 4, 5, 6, 7, 10

United States v. *Albarado*, 495 F. 2d 799 7

United States v. *Bell*, 464 F. 2d 667, cert. denied, 409 U.S. 991 6

United States v. *Dalpiaz*, 494 F. 2d 374 7

United States v. *Davis*, 482 F. 2d 893 ..... 9, 10

United States v. *Edwards*, 498 F. 2d 496 ..... 6, 7-8, 9

United States v. *Epperson*, 454 F. 2d 769, cert. denied, 406 U.S. 947 7

Page

Cases (continued):

United States v. *Fern*, 484 F. 2d 666 7

United States v. *Homburg*, 546 F. 2d 1350, cert. denied, 431 U.S. 940 ..... 7, 10

United States v. *Kroll*, 481 F. 2d 884 ..... 7, 8, 9, 10

United States v. *Martinez-Fuerte*, 428 U.S. 543 6

United States v. *Miner*, 484 F. 2d 1075 10

United States v. *Moore*, 483 F. 2d 1361 10

United States v. *Moreno*, 475 F. 2d 44, cert. denied, 414 U.S. 840 7

United States v. *Skipwith*, 482 F. 2d 1272 ..... 6, 7, 8, 9-10

United States v. *Slocum*, 464 F. 2d 1180 ..... 7, 8

United States v. *Williams*, 516 F. 2d 11 9

Constitution, statutes and regulation:

United States Constitution, Fourth Amendment 2, 4, 5, 7, 8

Air Transportation Security Act of 1974, Pub. L. No. 93-366, 88 Stat. 415 5

21 U.S.C. 844(a) 2

49 U.S.C. 1356 ..... 2, 5

49 U.S.C. 1472 5

49 U.S.C. 1511 ..... 2, 5

14 C.F.R. 121.538(b) 5

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-908

STEPHEN R. DEANGELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-4a) is reported at 584 F. 2d 46. The oral opinion of the district court (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1978, and a petition for rehearing was denied on October 30, 1978 (Pet. App. 5a). On December 6, 1978, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 6, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the physical inspection of petitioner's briefcase at an airline security checkpoint violated the Fourth Amendment, where petitioner had voluntarily consented to an x-ray examination of his briefcase as a prerequisite to boarding an airplane and that examination had revealed large suspicious dark areas in the briefcase.

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on two counts charging possession of marihuana and cocaine, in violation of 21 U.S.C. 844(a). He was sentenced to six months' imprisonment followed by two years' probation. The court of appeals affirmed (Pet. App. 2a-4a).

The evidence at trial showed that at approximately 8:45 p.m. on October 4, 1977, petitioner entered the security screening area in Washington National Airport in order to board the 9:00 p.m. Eastern Airlines shuttle flight to New York (S. Tr. 16, 17; Tr. 8-9, 48).[1] All passengers at the airport must pass through a checkpoint where they and their carry-on baggage are inspected for dangerous weapons and explosives. See 49 U.S.C. 1356, 1511. At least four signs were posted near and around the boarding-security area, alerting passengers that they and their carry-on baggage were subject to inspection. The sign on the x-ray machine read:

X-RAY BAGGAGE INSPECTION

Carry-on baggage is being
inspected by X-ray

* Inspection will not affect ordinary undeveloped film

[1]"S. Tr." refers to the transcript of the suppression hearing. "Tr." refers to the transcript of the trial.

* Remove all X-ray and scientific film from baggage
* Physical inspection may be requested

(Gov't Exh. 1; S. Tr. 19, 34, 37).[2]

Petitioner voluntarily placed his briefcase on the table for the purpose of x-ray inspection and then proceeded through the magnetometer (S. Tr. 24; Tr. 9, 14-15).[3] Because a large portion of the briefcase appeared dark on the x-ray machine, the security checker, Edna Rogers, informed petitioner that his bag would have to be opened for visual inspection (S. Tr. 21-22, 33; Tr. 10).[4] When petitioner objected and attempted to wrest his bag out of Rogers' hands, Federal Aviation Administration Police Officer James McRae, Jr., interceded on Rogers' behalf and told petitioner that they would have to inspect the briefcase before petitioner could board the plane (S. Tr. 22-23, 25; Tr. 10). Petitioner, who now appeared extremely nervous, said that he would take another mode of transportation to New York (S. Tr. 23, 24). However, Officer McRae responded that the briefcase had to be opened and searched for weapons, which he proceeded to do (S. Tr. 23, 62; Tr. 15). Plainly visible in the opened briefcase were 32 grams of marihuana, 14 grams of hashish and approximately $21,000 in cash (S. Tr. 38, 40, 42; Tr. 15-16, 29, 38, 49-50; Gov't Exh. 2). A search of petitioner incident to arrest produced 13 more grams of marihuana and a small amount of cocaine (Tr. 17-18, 36-37, 49, 50-51; Gov't Exhs. 3 & 4).

Petitioner moved to suppress the seized drugs, claiming that the physical search of his briefcase violated the

[2]The court of appeals slightly misquoted the sign (Pet. App. 3a).

[3]The briefcase was large enough to contain various weapons or explosives (S. Tr. 26-27).

[4]Rogers was employed by a private security agency (S. Tr. 16; Tr. 12).

Fourth Amendment. Petitioner contended that he had not consented to the search and that he should have been permitted to leave the airport rather than submit to the inspection. The district court denied the motion, however, finding that the search was reasonable in light of all the circumstances (Pet. App. 1a). The court of appeals affirmed, concluding that petitioner had consented to the search and that it was justified in any event under the rationale of *Terry* v. *Ohio*, 392 U.S. 1 (1968), in order to prevent possible injury to the officers or other persons at the airport (Pet. App. 2a-4a).

ARGUMENT

Petitioner contends (Pet. 5-12) that the search of his briefcase violated the Fourth Amendment. But, as the court of appeals correctly concluded, the search was justified under either of two rationales. First, under the principles of *Terry* v. *Ohio*, 392 U.S. 1 (1968), the airport security personnel properly opened petitioner's briefcase once the x-ray had shown large, suspicious dark areas inside the bag and petitioner had nervously attempted to wrest it away from the security guards (Pet. App. 3a). Second, by proceeding through the well-marked security area and voluntarily placing his briefcase on the x-ray table for electronic examination, petitioner consented to the further physical examination of his briefcase (Pet. App. 4a). No court of appeals has reached a contrary result with regard to a search similar to that involved here, and further review by this Court is therefore unwarranted.

1. Although petitioner asserts that the FAA officer violated his Fourth Amendment rights by physically inspecting his briefcase, "[i]t must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins* v. *United States*, 364 U.S. 206, 222 (1960). See *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977). Petitioner entered the airline security checkpoint area

intending to board an airplane. In accordance with statutorily mandated FAA regulations,[5] the airline personnel subjected both petitioner and his briefcase to initial electronic searches.[6] When the x-ray attendant announced that the bag had to be physically inspected (because its contents appeared suspicious), petitioner nervously attempted to take back the briefcase and leave the security area. Since at that point "the circumstances were sufficiently suspicious to cause a reasonably prudent man to conclude that [petitioner] might endanger the security officers and the other passengers in the airport" (Pet. App. 3a), the limited physical search that subsequently occurred did not violate the Fourth Amendment. See *Terry* v. *Ohio*, *supra*, 392 U.S. at 27.

This Court held in *Terry* that, even in the absence of probable cause to arrest, a policeman could stop a person for questioning and conduct a limited search for weapons where "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27. See also *Pennsylvania* v. *Mimms*, *supra*; *Adams* v. *Williams*, 407 U.S. 143 (1972). In concluding that such searches were reasonable, the Court balanced the nature and extent of

---

[5]In order to stem the tide of air piracy, Congress enacted the Air Transportation Security Act of 1974, Pub. L. No. 93-366, 88 Stat. 415. In addition to prohibiting various acts of air piracy, including an attempt to carry weapons aboard an airplane (see 49 U.S.C. 1472), the statute directs the FAA to promulgate regulations designed to deter and apprehend hijackers. See 49 U.S.C. 1356, 1511. Accordingly, the FAA requires air carriers to use weapon detection devices to screen all passengers and property that the airlines intend to carry. See 14 C.F.R. 121.538(b).

[6]Petitioner voluntarily went through the magnetometer and voluntarily placed his bag on the table for x-ray inspection. He concedes that these initial searches did not violate the Fourth Amendment (Pet. 7).

the governmental interests involved (protection of law enforcement officers and the public) against the intrusion on individual privacy occasioned by a limited weapons search. 392 U.S. at 22-27. See also *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967).

In the context of airplane hijackings, the governmental interest, as measured by the threat to the public, is unquestionably substantial. As Judge Friendly has observed (*United States* v. *Bell*, 464 F. 2d 667, 675 (2d Cir.) (concurring opinion), cert. denied, 409 U.S. 991 (1972)):

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.

By the same token, the intrusiveness of airline security procedures is significantly less than that posed by the street encounters approved in *Terry*. Because all passengers, having voluntarily submitted to the security check by choosing to travel by airplane, are subject to the procedures, the limited weapons searches that occur do not carry any stigma. See *United States* v. *Edwards*, 498 F. 2d 496, 500 (2d Cir. 1974); *United States* v. *Skipwith*, 482 F. 2d 1272, 1275-1276 (5th Cir. 1973). Moreover, the public nature of the limited search and the airlines' strong interest in minimizing harassment of their passengers greatly reduce the likelihood that abusive searches will occur. *Ibid.* In addition, a passenger can further reduce the chance that his luggage will be physically searched by

checking it on board the airplane rather than carrying it on personally. Accordingly, all the courts of appeals that have considered the question have concluded that a limited *Terry*-type weapons search of a passenger and his carry-on baggage does not violate the Fourth Amendment, provided that there are "specific, articulable facts * * * to support a reasonably prudent man's belief that his or others' safety might be in danger." *United States* v. *Albarado*, 495 F. 2d 799, 810 (2d Cir. 1974). See, *e.g.*, *United States* v. *Homburg*, 546 F. 2d 1350, 1352-1354 (9th Cir. 1976), cert. denied, 431 U.S. 940 (1977); *United States* v. *Edwards*, *supra*; *United States* v. *Dalpiaz*, 494 F. 2d 374 (6th Cir. 1974); *United States* v. *Fern*, 484 F. 2d 666 (7th Cir. 1973); *United States* v. *Skipwith*, *supra*; *United States* v. *Kroll*, 481 F. 2d 884, 886-887 (8th Cir. 1973); *United States* v. *Slocum*, 464 F. 2d 1180 (3d Cir. 1972); *United States* v. *Epperson*, 454 F. 2d 769 (4th Cir.), cert. denied, 406 U.S. 947 (1972).

Here, petitioner's briefcase failed to satisfy the x-ray examination. The large suspicious dark areas that showed on the x-ray screen could well have contained a pistol, explosive or other dangerous weapon. See, *e.g.*, *United States* v. *Moreno*, 475 F. 2d 44, 49 (5th Cir.), cert. denied, 414 U.S. 840 (1973). And when the x-ray attendant stated that she would have to open the suspicious briefcase, petitioner became extremely nervous and attempted to wrest the briefcase away from her. In these circumstances, the officers had reasonable grounds to fear for their own safety and the safety of the passengers who had already passed through the screening devices (see Pet. App. 3a),[7] and they therefore properly opened petitioner's briefcase to look for weapons.[8] See, *e.g.*, *United States* v. *Edwards*,

---

[7]At the time petitioner entered the boarding area, some 50 other passengers had already cleared security (S. Tr. 20).

[8]Once the briefcase was opened, of course, the officers were justified in seizing the marihuana that fell into plain view.

supra, 498 F. 2d at 500-501; *United States* v. *Kroll*, *supra*, 481 F. 2d at 886-887; *United States* v. *Slocum*, *supra*, 464 F. 2d at 1183.

2. The court of appeals also correctly concluded that petitioner consented to the search of his briefcase by attempting to pass through the security checkpoint and to board the airplane. A number of signs warned petitioner that airline passengers and their carry-on luggage were subject to search prior to boarding.[9] Furthermore, "because of the widespread publicity given to the government's efforts to cope with the piracy of aircraft, it [is] general knowledge that citizens boarding planes [are] subject to special scrutiny and to weapon searches." *United States* v. *Skipwith*, *supra*, 482 F. 2d at 1274.[10]

Petitioner, nonetheless, voluntarily chose to travel by airplane. He therefore filled out his boarding pass, entered the security area and placed his briefcase upon the x-ray table for inspection. Although petitioner concedes that he thereby consented to the initial electronic searches, he claims that he should have been allowed to revoke his consent when his bag did not pass the x-ray inspection, so

---

[9]In addition to the sign that was posted on the x-ray machine, FAA requires that the following sign be posted in the vicinity of the security checkpoint (C.A. App. A-14 to A-15):

> IT IS A CRIME to carry a concealed weapon aboard aircraft
>
> Federal safety rules require inspection of persons and hand carried articles passing an inspection point
>
> Inspection may be refused
>
> Persons refusing inspection will not be permitted to pass the inspection point

("C.A. App." refers to the appendix in the court of appeals.)

[10]In any event, knowledge of the right not to consent to a search is not a prerequisite to the valid waiver of Fourth Amendment rights. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). The fact that the consent is, as here, an informed decision is a factor to be considered by the courts in assessing the existence and scope of the consent (*ibid.*).

long as he was willing to forego the airplane trip (Pet. 7).[11] But petitioner's consent to the inspection of his briefcase necessarily encompassed not only the x-ray analysis but also any further reasonable procedures needed to ensure that petitioner was not carrying a weapon. See, *e.g.*, *United States* v. *Skipwith*, *supra*, 482 F. 2d at 1276-1277.[12]

Petitioner's position, if accepted, would allow an airline passenger to withdraw his consent whenever the initial search indicated that he might be carrying a weapon. It would thus create a risk-free inspection system for would-be hijackers. If the hijacker's weapons are not detected by the x-ray machine or magnetometer, he would board the airplane. If they are detected, he would merely withdraw from the security area, free to try another day. In short, as the court of appeals correctly concluded, petitioner's informed decision to board the airplane must constitute a consent to the full security screening process. See *United States* v. *Williams*, 516 F. 2d 11 (2d Cir. 1975); *United States* v. *Edwards*, *supra*, 498 F. 2d at 501-505 (Oakes, J., concurring); *United States* v. *Davis*, 482 F. 2d 893, 913 (9th Cir. 1973); *United States* v. *Skipwith*, *supra*,

---

[11]Petitioner relies (Pet. 8-9) on the wording of the x-ray sign. See pages 2-3, *supra*. However, the phrase "physical inspection may be requested" refers only to a passenger's option of asking to have his belongings (*e.g.*, scientific or developed photographic film) physically inspected rather than risking x-ray damage. Thus, there is no basis for arguing that the FAA officer, in protecting the public, was limited to "requesting" a physical examination of petitioner's bag.

[12]Of course, the consent is limited only to reasonable procedures calculated to detect weapons. If these procedures are exceeded, the fruits of the unreasonable search would not be admissible on the consent rationale. See *United States* v. *Kroll*, *supra*, 481 F. 2d at 886. Petitioner does not contend that the search in this case exceeded the scope required to maintain airport security or that it was merely a pretext to look for items other than weapons.

482 F. 2d at 1281 (Aldrich, J., dissenting on other grounds).[13]

[13]Petitioner erroneously contends (Pet. 5-6) that the decision below conflicts with other courts of appeals' decisions. Although the Ninth Circuit indicated in *United States* v. *Homburg*, *supra*, that a particular airport search was not justified as a matter of consent, that statement was dictum, since the court upheld the search on the rationale of *Terry* v. *Ohio*, *supra*. Two earlier Ninth Circuit cases are also distinguishable because at the time of the searches, which occurred before the airlines posted warning signs, the passengers had not yet entered the boarding area. See *United States* v. *Moore*, 483 F. 2d 1361 (9th Cir. 1973); *United States* v. *Miner*, 484 F. 2d 1075 (9th Cir. 1973). And the continuing validity of *United States* v. *Davis*, 482 F. 2d 893 (9th Cir. 1973), insofar as it rejected the *Terry* rationale, has been called into question by the Ninth Circuit's subsequent decision in *Homburg*. Moreover, *Davis* involved a search that occurred before the FAA required airlines to post signs warning passengers that they were subject to search. Finally, the Eighth Circuit's decision in *United States* v. *Kroll*, *supra*, is completely in accord with the decision below. In that case, the court found that although the principles enunciated in *Terry* justified a briefcase search similar to that which occurred here, the further search of a seemingly innocent envelope found inside the briefcase was not required by considerations of airport security.

Petitioner's reliance upon *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), is also misplaced. That case involved a "consent" based upon official coercion. Here, petitioner concedes that he knowingly consented to the initial x-ray search (Pet. 7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW J. LEVANDER
Assistant to the Solicitor General

SIDNEY M. GLAZER
Attorney

FEBRUARY 1979

DOJ-1979-02